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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-287

HERMAN DIAMOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
STATE OF GEORGIA,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy
Attorney General

DON A. LANGHAM
Deputy Attorney General

ROBERT S. BOMAR
Senior Assistant
Attorney General

PATRICIA T. BARMEYER
Assistant Attorney General

Counsel for Respondent
State of Georgia

Post Office Address:

132 State Judicial Bldg.
Atlanta, Georgia 30334
Phone: (404) 656-3389

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The Respondent, State of Georgia, Plaintiff-Intervenor in the United States District Court and Appellee in the Court of Appeals for the Fifth Circuit, respectfully urges denial of the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 512 F.2d 157 (5th Cir. 1975) and is attached hereto as Appendix A. The opinion of the United States District Court for the

Southern District of Georgia (Savannah Division) is not reported, and a copy of the opinion is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the decision of the lower court permanently enjoining petitioner from filling a tidal marsh within the navigable waters of the United States without the requisite permit from the United States Army Corps of Engineers.

STATUTE INVOLVED

33 U.S.C. § 403 (The Rivers and Harbors Act of 1899, Section 10):

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or

of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

STATEMENT OF THE CASE

The United States filed this action seeking a preliminary and permanent injunction against further filling of tidal marshlands by petitioner in violation of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Jurisdiction is founded on 28 U.S.C. § 1345. Pursuant to an order of the District Court, the State intervened as a plaintiff and joined the United States in seeking a permanent injunction against further filling or altering of tidal marshlands. (App. B, p. 1b).

This case involves a small parcel of tidal marsh along Richardson Creek in Chatham County, Georgia. (App. B, p. 3b). Petitioner claims ownership of the marsh by virtue of a 1965 deed to the area. (App. B, p. 3b). Richardson Creek forms part of the dendritic web of creeks and rivers that traverse and sustain the marshes of coastal Georgia. (App. B, p. 3b). Richardson Creek flows into the Wilmington River, one of the major tidal rivers of Chatham County, which forms part of the Intracoastal Waterway. (App. B, p. 3b).

In 1964 the area in question consisted entirely of marshland, which would today be below the level of mean high water had it not been filled. (App. B, p. 4b). In 1965 petitioner applied for and obtained a permit to build a forty-foot walkway and dock extending into Richardson Creek. (App. B, p. 11b). This permit neither contained nor implied any authorization

for a bulkhead or fill. (App. B, p. 12b).

From about 1965 until the time that this action was filed, petitioner proceeded to fill the area in order to have enough high ground to obtain a county building permit. (App. B, p. 7b). The United States Army Corps of Engineers first became aware of petitioner's unauthorized filling of the marsh in June, 1972. Shortly thereafter, the Corps of Engineers by letter requested petitioner to cease filling in the marsh. (App. B, p. 6b). Later in the summer of 1972 petitioner was again advised by the federal authorities and by the state authorities that a permit was required for filling in tidal marshes. (App. B, p. 6b). In April, 1973, state and federal officials visited the site and witnessed petitioner engaged in filling activities. (App. B, p. 7b). This action was filed the following day.

After six days of testimony, the United States District Court on April 17, 1974, entered an order permanently enjoining petitioner from any further filling in navigable waters of the United States. (App. B). The Court of Appeals for the Fifth Circuit affirmed this judgment on April 24, 1975. (App. A).

ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit is based on well-settled principles of federal law and presents no question on which the courts of appeals are in disagreement.

The thrust of petitioner's argument is that he owns the marsh area in question and that therefore he is entitled to fill that marsh without having to obtain a permit from the United States Army Corps of Engineers. Petitioner concedes that regulations adopted by

the Corps of Engineers require such a permit, but he contends that the regulations violate his "riparian rights" and his right to due process of law.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) makes it unlawful to fill, alter or modify the course, condition or capacity of any navigable water of the United States without a permit from the Corps of Engineers. The regulations of the Corps of Engineers provide that tidal marshlands, up to the mean high water mark, are navigable waters of the United States and come within the terms of 33 U.S.C. § 403. 33 C.F.R. § 209.260(k)(2).

While this Court has never addressed the question, it is clear that the navigable waters of the United States extend to the shoreward limit, or mean high water mark, of tidelands, including tidal marshes. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (4th Cir. 1974), *cert. denied*, _____U.S._____ (1975); *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418 (5th Cir. 1973); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Within the navigable waters of the United States the federal navigational servitude is paramount to riparian and other proprietary rights. 43 U.S. C. § 1314; *United States v. Stoeco Homes, Inc., supra.; see, e.g., South Carolina v. Georgia*, 93 U.S. 4, 23 L.Ed. 782 (1876); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 724, 18 L.Ed. 96 (1865).

Petitioner cites the case of *Illinois Central R. R. v. Illinois*, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892) for the proposition that "[M]arshlands within the Petitioner's boundaries belong absolutely to the Petitioner." (Petition for a Writ of Certiorari, p. 2). In fact, however, that case recognizes that the ownership

of and sovereignty over lands covered by tidewaters is "subject always to the paramount right of Congress to control their navigation. . . ." 146 U.S. at 435, 36 L.Ed. at 1036. Congress can require, and has through the Rivers and Harbors Act required, that a permit be obtained prior to modification of the capacity of any navigable water of the United States.

Petitioner also contends that Richardson Creek, adjacent to the area in question, is not navigable, and that the area in question is not below mean high water. However, the District Court found that Richardson Creek is navigable in fact and that the area would have been inundated at mean high water had it not been filled. (App. B, pp. 4, 7b). The Fifth Circuit decision held that these findings were not clearly erroneous. (App. A, pp. 4-5a). These issues are not of sufficient importance to warrant the issuance of a writ of certiorari.

CONCLUSION

For the above reasons, the State of Georgia urges this Court to deny the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy Attorney General

DON A. LANGHAM
Deputy Attorney General

ROBERT S. BOMAR
Senior Assistant Attorney General

PATRICIA T. BARMEYER
Assistant Attorney General

Post Office Address:

132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3389

APPENDIX

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APPENDIX A

UNITED STATES of America et al.,

Plaintiffs-Appellees,

v.

Herman DIAMOND,

Defendant-Appellant.

No. 74-2273.

United States Court of Appeals,

Fifth Circuit.

April 24, 1975.

* * *

Appeal from the United States District Court for the Southern District of Georgia.

Before BELL, THORNBERRY and GEE, Circuit Judges:

THORNBERRY, Circuit Judge:

This is an appeal from the district court's granting of a permanent injunction forbidding appellant Diamond "from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations" on certain salt water tidal marshlands owned by Diamond. Appellant argues that the injunction must be vacated on four separate grounds: (1) the Secretary of the Army or his designate did not request the bringing of this suit, as required by statute;(2) the District Engineer's granting of a dock permit to appellant in 1965 established a harbor line, and filling shoreward of this line is expressly permitted if begun—as appellant's operations were—before 1970; (3) the marsh in question is not part of a navigable waterway and thus falls outside the jurisdiction of the Corps of Engineers;

and (4) appellant's property is above the mean high tide line, and the Corps of Engineers has no authority landward of this line. Finding no error in the findings and conclusions of the district court, we affirm.

[1, 2] (1) 33 U.S.C. § 413 makes it the "duty of United States attorneys to vigorougly prosecute all offenders against . . . [sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title] *whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated* . . ." (emphasis added). The government brought suit against Mr. Diamond pursuant to 33 U.S.C. §§ 403 and 407. Appellant argues that no person authorized by § 413 requested proceedings against him. It is clear, however, that the United States Attorney's duty to prevent violations of the law justifies his taking action against illegal fill operations regardless of who brings the violation to his attention. United States v. Interlake Steel Corp., N.D.Ill.1969, 297 F.Supp. 912. *See also* United States v. Rohm & Haas, 5 Cir. 1974, 500 F.2d 167, 174; Connecticut Action Now, Inc. v. Roberts Plating Co., 2 Cir. 1972, 457 F.2d 81, 87, & n. 11.

[3] (2) In 1965 appellant sought and obtained a permit to build a walkway and dock on his property. Up until 1970, riparian owners with open pile structures (docks) could fill shoreward from the dock without a permit, as long as their dock marked the boundary of a designated harbor line. In 1970 the applicable regulation was amended to require a permit for this type of filling, but the new regulation specifically exempted fill operations begun prior to its effective date. 33 C.F.R. § 209.150. Appellant contends that the District Engineer's approval of his dock in 1965 constituted a *de facto* designation of a harbor line. Hence, he argues, because he

began his fill operations before 1970, he needs no permit.

The government responds that the Regulations provide a specific procedure for designating harbor lines, and no such lines have ever been established around Diamond's property. Intervenor, State of Georgia, also contends that Diamond is not a riparian owner. The district judge found that "[t]he grant of the permit in 1965 as to the dock facility did not constitute establishment of any harbor line" (App. at 53) and cited United States v. Stoeco Homes, Inc., D.N.J.1973, 359 F.Supp. 672. We note that the relevant portion of the district court opinion in *Stoeco Homes* was disapproved on appeal. United States v. Stoeco Homes, 3 Cir. 1974, 498 F.2d 597, 602-04. The Third Circuit stated in dicta that 33 C.F.R. § 209.150, which as noted permits continuance of fill operations directed shoreward of existing harbor lines and begun prior to the effective date of the new Regulation, "appears to refer to actual harbor lines established by any authority." 498 F.2d at 604. The court also noted that the district court failed to mention the new regulation and that the evidence tended to show the government had in fact designated harbor lines in the area involved in that case.

In the case before us the district judge considered the effect of 33 C.F.R. § 209.150(b)(2). He held that the evidence showed that harbor lines are designated only in accordance with formal procedures and that no harbor lines have been established in the area of Diamond's property. These conclusions have not been shown to be incorrect. We see nothing in § 209.150 suggesting that the Regulation is concerned with any harbor lines but those established in accordance with the procedure set out in § 209.150(c) and its predecessors. Thus, appellant gained no right to fill the marsh by

obtaining the dock permit.

[4, 5] (3) Appellant also contends that Richardson Creek, the body of water adjoining his land, is not navigable and thus that the Corps of Engineers has no jurisdiction over it. The district court found as a fact that "Richardson Creek is navigable within the meaning of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 403, 407) and the Regulations promulgated pursuant thereto" (App. at 46). Appellant's main argument here is that Richardson Creek is not navigable because it has no interstate or foreign commerce and is not always navigable in fact. These two tests, however, are not necessarily controlling on legal navigability. *See* United States v. Holland, M.D.Fla.1974, 373 F.Supp. 665, 668-70; United States v. Lewis, S.D.Ga.1973, 355 F.Supp. 1132, 1136-39; United States v. Underwood, M.D.Fla.1972, 344 F.Supp. 486, 489-93; *cf.* United States v. Stoeco Homes, Inc., *supra*, 498 F.2d at 610 ("In tidal waters the test, in our view, remains what it was before 1851, the ebb and flow of the tide"). *But see* United States v. American Cyanamid Co., S.D.N.Y. 1973, 354 F.Supp. 1202, 1204-05, aff'd 2 Cir. 1973, 480 F.2d 1132. The district court credited testimony tending to show that Richardson Creek is navigable in fact. Because this finding is not clearly erroneous, Fed.R. Civ.P. 52(a), further inquiry by this court into navigability is precluded.

[6] (4) "[T]he Corps has no power landward of . . . [the mean high tide line] to regulate . . . [the landowner's] conduct or force reconstruction of the topography as it existed before he began work." United States v. Joseph G. Moretti, Inc., 5 Cir. 1973, 478 F.2d 418, 428-29; *cf.* United States v. Holland, *supra*, at 670 of 373 F.2d; United States v. Lewis, *supra*, at 1136-37, 1139-40 of

355 F.Supp. Appellant here claims that the district judge clearly erred in accepting testimony by one government witness and finding as a fact that "the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled" (App. at 49). This contention challenges a factual determination by the trial court that can be overturned only for the plainest sort of error. Fed.R.Civ.P. 52(a). No such error appears here.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, STATE OF GEORGIA, *Plaintiff-Intervenor*, VS. HERMAN DIAMOND, *Defendant.*	CIVIL ACTION NO. 3092

FINDINGS OF FACT AND CONCLUSIONS OF LAW JUDGMENT AND ORDER

The United States brought this action for preliminary and permanent injunction against Herman Diamond, pursuant to 33 U.S.C. §§ 403 and 407, in connection with an allegedly unauthorized fill of marshland in Chatham County, Georgia. The State of Georgia intervened in the action on April 7, 1973, and sought a permanent injunction against further filling or altering the coastal marshlands of the State. Both the United States and the State of Georgia seek mandatory relief in the way of removal of the fill material placed by defendant in the marsh area involved.

On April 5, 1973, this Court issued a Temporary Restraining Order in connection with the depositing or dumping by defendant of refuse of any kind in the marshlands along Richardson Creek. This Order ex-

pired after ten days but has been kept in effect by oral direction of the Court at at least two of the several evidentiary hearings in the case. My notes and the records of the Court reflect that such hearings were held during 1973 on May 28th, August 10th, August 29th-30th, September 4th and November 8th.

On June 14, 1973, defendant filed with the Corps of Engineers an application for an After-the-Fact Permit in regard to the fill. The application has been pending since that time and until a recent date. Mr. Diamond who appears as his own counsel has on at least two occasions urged that this Court is not empowered to grant mandatory injunctive relief in view of the fact that the administrative remedies in connection with his After-the-Fact Permit had not been acted upon by the Corps of Engineers. See *United States v. Moretti*, 478 F.2d 418, 430 (5th Cir.).[1]

On two occasions I urged the Corps of Engineers to expedite the handling of the permit in question.

Acting on matters affecting environment, ecology and wildlife is a time-consuming process and involves consideration by numerous Government and state agencies. See 33 C.F.R. § 209.120(7)(d).[2]

On March 26, 1974, the Department of the Army found that the issuance of an After-the-Fact Permit to Mr. Diamond "for the proposed and existing fill will

[1] In Mr. Diamond's brief on November 19, 1973, he pointed out that he had filed an After-the-Fact Permit and that an official of the Corps of Engineers "has tried in every way to delay this permit".

[2] Under the Environmental Policy Act the Army "must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors". *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir.); 33 CFR § 209.120(f).

not be in the public interest, and therefore, the permit is hereby denied".

Findings of Fact

1. In 1965 Charles Wood, Sr. and Herman Diamond acquired certain marshland bounded on the north by Richardson Creek and on the south by Oatland Island Road. The fill is located on a portion of the land described in this deed.

2. In 1969 Mr. Wood conveyed his one-half interest in a 100-foot strip of the marsh to the defendant. In 1972 Mr. Diamond obtained a deed from Wood conveying the latter's one-half interest in a fifty-foot strip of marshland adjoining the 100-foot parcel above described and located immediately to the east thereof.

3. Richardson Creek forms part of the web of creeks and rivers that traverse the marshes of Chatham County and coastal Georgia. Richardson Creek makes off of the Wilmington River near Causton's Bluff. The Wilmington is one of the major tidal rivers of Chatham County and comprises several miles of the Intracoastal Waterway. From their confluence Richardson Creek flows through the salt marshes in a generally easterly direction and eventually goes into Turners Creek. In turn, the latter empties into the Wilmington River at a point approximately 8 or 10 miles from its mouth at the head of Warsaw Sound. The Sound borders the Atlantic Ocean.

4. Along Richardson Creek are located houses and numerous privately-owned docks. Mr. Diamond himself owns a floating dock in Richardson Creek at the end of the marshfill. The creek is navigable at that point for cabin cruisers as long as 45′ in length.

5. There was testimony (which I credit) that Richardson Creek is navigable throughout its extent at low tide and that it has a maximum depth at mean low water of 4.8′ in the area involved. The mean depth is 2½′ to 3′ at mean low tide.

6. At mean high water all of the marsh lying to the eastward of the Diamond fill is inundated.

7. In 1932 the Corps of Engineers classed Richardson Creek as a tributary of Wassaw Sound and as being navigable throughout. See "Report on navigability of Streams Entering the Atlantic Ocean Between Tybee Creek and Wassaw Sound, Inclusive". The Report classifies Richardson Creek as "Unquestionably Navigable: In Present Commercial Use by Boats of 6-Foot Draft or Over" and that it is navigable for its full length of 5.9 miles.

8. Richardson Creek is navigable within the meaning of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 403, 407) and the Regulations promulgated pursuant thereto.

9. Government's Exhibit No. 6 is a 1964 aerial photograph which includes the coastal area concerned in this litigation. It demonstrates that at that time the fill area constituted marshland. The photograph also shows a very small creek or rivulet running from Richardson Creek southward through what is now the filled area of the marsh. A 1973 survey (Government's Exhibit No. 1, August 29, 1973) reveals traces of the rivulet at its mouth on Richardson Creek.

10. In June, 1968, Mr. Diamond obtained from the authorities of Chatham County a Permit for a "rubbish land fill". See Defendent's Exhibit No. 2, May 28, 1973. An inspection report attached to the application there-

for revealed that in January, 1970, the fill "is just about completed" and that it was "just a question of more dirt". Government's Exhibit No. 1, August 10, 1973.

11. Mr. Diamond testified that the purpose of the fill in question was to erect a house and that he could not obtain a County building permit for building same without additional highland.[3] Transcript, May 28, 1973, 101.

12. At the hearing on September 4, 1973, M. C. Anderson who is engaged in the land-clearing business testified that he had placed numerous truckloads of fill in the marsh at Mr. Diamond's request. He began the marshfill in 1966 and his activities continued through 1969. The fill was described by Anderson as consisting of roots, stumps, logs, leaves, dirt and debris. Transcript, September 4, 1973, 9-11.

13. Mr. Diamond testified that he did not in fact give Mr. Anderson permission to dump on the land in question. Transcript, May 28, 1973, 99-100. He stated that "all these landscape clearing gentlemen—there were a dozen of them—they had no place to dump their fill, and they dump it anywhere that their trucks could find a hole. It was very convenient for them to come off of East Pine, which was building very rapidly . . . We weren't there and couldn't watch it but when we come there a month or six weeks later, and see this fill and call the police on several occasions." Mr.

[3] ". . . the County required twenty thousand square feet. We didn't quite have twenty thousand square feet of high ground, we only had about fourteen thousand. So, I asked Mr. Blitch if we could, and he said they have no provisions to issue any permit for that type of fill. That we were well out of range of any channel in the river or the low water mark."

Diamond denied that anyone ever had his permission to place material in the area in question. Transcript, May 28, 1973, 102-103.

14. Mr. Diamond's fill first came to the attention of the Corps of Engineers in June, 1972, when Government representatives made a routine inspection of unauthorized dumping and filling in marsh adjacent to Richardson Creek. By letter dated June 12th the District Engineer requested Diamond to stop any further filling of the marsh and to take necessary steps to contain any and all material that may be displaced by tides, storms or floods into navigable waters or their tributaries. He was furnished copies of excerpts from Title 33, U.S.C. §§ 403, 406, 407, 409, 411 and 412.

15. Mr. Diamond responded to the District Engineer by letter dated June 16, 1972, stating that he had reviewed the material furnished to him and did not feel his property was subject to the Corps of Engineers' jurisdiction.

16. On August 29, 1972, the District Engineer advised defendant that he had reviewed the file and had determined that the property was subject to regulatory authority of the Corps of Engineers and that the fill had been placed in the marshland without any Permit. Mr. Diamond was requested either to remove the fill and restore the marshland to its original condition or file an application for a Department of the Army Permit.

17. Dr. Frederick C. Marland who is Director of Marshland Protection, Georgia Department of Natural Resources, testified that he visited the fill site on August 6, 1972, and advised Mr. Diamond that the work in progress was unauthorized. At that time, Dr.

Marland observed some activity and equipment on the fill.[4] Transcript, May 28, 1973, 43.

18. Dr. Marland again visited the site in April, 1973. He testified that he observed the defendant pushing mounds of dirt into the marsh. Transcript, 48.

19. At that time he advised Dr. Marland that he was not going to apply for a Permit. After being warned that his actions were illegal, Mr. Diamond, according to Marland, said "he was going to dump and watch him. And he did". Transcript, May 28, 1973, 48.

20. Under the evidence in this case, it is clear that Diamond had determined to fill the marshland area in question; that he obtained a County Permit to do so; planned to erect a house on the fill, and caused or knew that the marsh area in issue was being filled with stumps, debris, logs and dirt. Defendant filled the two-acre marsh area without a Permit from the Army and continued to fill after being warned that such activity was illegal.

21. The Court finds, under the evidence, that the mean high water elevation in Richardson Creek at a point in front of the Diamond fill is 7.4′ above mean low water. As stated, at mean high water all of the marsh lying to the east of the Diamond fill is inundated and the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled. Government's Exhibit No. 1, August 29, 1973 (a topographic survey of the filled area) reflects that all elevations in the marshland to the east of the fill are below the mean high water elevation in the vicinity.

[4] Defendant's Exhibit No. 1 (August 10, 1973) shows that on April 4, 1973, he purchased six loads of dirt for $54. Mr. Diamond explained that this was due to erosion of the top area of the fill by reason of high tides. Transcript, May 28, 1973, 98-99.

22. Earl F. Titcomb, Jr. who is Chief of the Geologist Section, Corps of Engineers testified as to the nature of the substance retrieved from drillings (ordered by the Court) on the site in controversy. In one instance a hole was drilled to the extent of 17 feet and in others around 12 feet. Transcript, August 29, 1973, 26, 35. At a depth of 3 feet to 4½ feet material was found that did not appear to be indigenous to the marsh. p. 37. At a depth of 9 feet to 10½ feet "fat clay" was found which is definitely a type of material found in marsh land. At 6 feet to 7½ feet material retrieved by boring contained what could clearly be discerned as marsh grass. p. 44. In the drilling zone denominated as "C" bits of marsh grass and peat found represented, in the opinion of Mr. Titcomb, "the natural ground surface" while the material taken from Zone "B" ("black, silty sand") represented "the material brought in". p. 50. The surface of the marsh as it existed prior to the fill was established by the borings as being at an elevation starting below mean high water.

23. At the hearing on September 4, 1973, a Government witness, Mark Horton, who is a Fisheries Biologist in the Bureau of Sports Fisheries and Wildlife, Florida, testified that in June, 1973, a bait trawl was made along Richardson Creek, including the area in front of the Diamond marshfill. It produced a catch of croaker, pinfish, white shrimp, brown shrimp, hogchoaker and blue crab. Crab and shrimp eat the organic matter produced by the marsh grass. The shrimping industry in Georgia is a sizeable one yielding an annual harvest of around $6,000,000. Transcript, September 4, 1973, 44-47. Marsh grasses (spartina alterniflora) are a vital

link in the food chain of many species of marine life.[4] Marshlands are the nursery of the sea.

24. The destruction of marshland has a definite effect on marine ecology. Of course, it varies with the size of the altered area. What the statute and regulations require is that before any marshland over which the federal government has jurisdiction is filled a Permit must be obtained from the proper authorities. None was issued to Mr. Diamond. The fact that the effect on ecology or navigation might be small is not the controlling factor.[5] There was and is a deleterious effect in the instant case on both.

25. The Rivers and Harbors Act of 1899 (33 U.S.C. § 407) makes it unlawful to discharge, deposit or cause to be discharged or deposited refuse of any kind in a

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[4] "The importance of tidal marshes in the life cycle of living organisms has commended them to such characterizations as 'the most productive areas on earth' and as a 'factory' of basic animal and plant nutrients. . . . A multitude of life forms are indigenous to tidal marshes, . . ." See James M. Kramon, "Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes," *Maryland Law Review* (1973), XXXIII, 231, 235.

"A Georgia salt marsh can outperform an average wheatfield several fold in organic production. The same author says that at least two-thirds of the nation's commercial fishing resources are made up of species that 'spend part of their life cycle in estaurine areas.' Ludwik v. Tetclaff, 'The Coastal Zone-Control Over Encroachments in the Tidewaters,' Environmental Law Review (1972), 618, 619. Georgia's Spartina alterniflora marshes produce five to nine tons of plant material an acre a year. 'Can We Save our Salt Marshes,' National Geographic, Vol. 141 (June, 1972), p. 733." See *United States v. Lewis*, 355 F. Supp. 1132, note 10 (S.D., Ga.).

[5] ". . . works in wetland areas, particularly estuarine areas . . . are often carried out in an uncoordinated and haphazard manner, and the result is the piecemeal destruction of valuable wetlands, marshes, and coastal estuarine areas." House Comm. on Gov't. Operations, Increasing Protection for Our Waters, Wetlands, & Shorelines: The Corps of Engineers, H.R.Rep.No.1323, 92d Cong., 2d Sess. at 7 (1972).

navigable water. Fill was placed or caused to be placed in the marsh area in question by Mr. Diamond. Some of it has washed into Richardson Creek during high tides and heavy rains.

26. The filling in of the marsh area with logs, stumps and debris offers a potential threat to navigation in the event of storms, hurricanes or other abnormal tide or wind conditions which might carry such material into the stream.

CONCLUSIONS OF LAW

1. This Court has jurisdiction, pursuant to the provisions of 28 U.S.C. §§ 1333 and 1345 and 33 U.S.C. §§ 403, 406, 407, 411, 413.

2. For regulatory purposes the jurisdiction of the Corps of Engineers as to "navigable waters" extends "laterally to the entire water surface and bed of a navigable water body". It "includes all the land and waters below the original high water mark". In coastal areas jurisdiction extends to the line on the shore reached by the plane of the mean (average) high water. Marshlands are "navigable in law" only so far as the area is "subject to inundation by the mean high waters". 37 Federal Register, No. 176, Part 209.260. See *United States v. Lewis, supra.*

3. The fill area is within the navigable waters of the United States as defined by interpretative Regulations which have a basis in existing and current case law.

4. The defendant filled in and altered the marshland without prior approval of the Corps of Engineers and the Secretary of the Army in violation of the Rivers and Harbors Act of 1899 and in doing so has irreversibly altered the natural condition of the site and irreparably damaged the environment and ecology.

5. It is plain that under *United States v. Moretti, supra*, at 431, when an After-The-Fact Permit is sought a federal judge has no power to cut off the statutory or administrative scheme of relief and substitute his judgment for that of the Corps of Engineers and the Department of the Army made in collaboration with departments or agencies under environmental statutes. In other words, this Court has been unable since June, 1973, to order mandatory relief in the way of the removal of the fill. The Department of the Army has, as noted, refused the issuance of an After-The-Fact Permit. On March 26, 1974, the Corps of Engineers through the District Engineer, Colonel Edwin C. Keiser, informed Mr. Diamond that "all of the debris, fill material, and bulkhead are to be removed from marshland below the historic mean high water line to a level of the original marsh elevation and placed in an approved disposal area. The above is to be accomplished not later than 120 days from receipt of this letter." The Regulation provides:

> "Where after-the-fact authorization is not determined to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished and establish a reasonable period of time for the applicant to complete such actions. The District Engineer, after denial of the permit, will again consider whether civil or criminal action is appropriate." See 39 Federal Register § 209. 120(12)(c)(v).

6. In 1965 the Corps of Engineers issued to Mr. Diamond a Permit to construct a dock in Richardson Creek at the site described. See Government's Exhibit No. 5, May 28, 1973. The defendant contends that the issuance thereof established the "harbor line" under

the Regulations of the Corps of Engineers on that subject and that he was not required to obtain a Permit for filling in marshland between the harbor line so established in view of 33 CFR § 209.150(2). It provides:

> "Applications for permits for work in navigable waters shoreward of harbor lines shall be filed and processed in accordance with the provisions of applicable sections of this part. For work already completed or commenced in conformance with existing harbor line authority before that date, no permit is required."

The grant of the Permit in 1965 as to the dock facility did not constitute establishment of any harbor line. The testimony at the hearings showed that harbor lines are established only in designated harbors and waterways and that the Secretary of the Army has not so designated Richardson Creek. The dock permit conferred no right on defendant with respect to filling the marsh between that point to the shore or highland. In *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 678 (D.,N.J.) it is said:

> "Defendant argues that the Government established federal harbor lines or ratified State harbor lines and that as a result it was relieved of the requirement to obtain a permit for work done shoreward of those harbor lines. This is incorrect in fact and in law. The Federal Government has not established harbor lines in the Back Thorofare area, nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. The presence of federal harbor lines, however, is irrelevant to the requirement of obtaining an appropriate federal permit for work in navigable waters."

ORDER AND JUDGMENT

The recent action of the Corps in denying an After-The-Fact Permit is judicially reviewable under the Administrative Procedure Act, 5 U.S.C.A. §§ 702, 704. See *Moretti*, at 432.[6] As I view things, the enforcement of the law and regulations and the employment of appropriate sanctions to that end in this case has become an administrative function in view of the application for the Permit and the declination thereof by the Corps of Engineers. The proper procedure for this Court is to abstain from granting any mandatory injunctive relief to plaintiff in this case, leaving the defendant to pursue his administrative remedies or such judicial appeals as he may take. Meanwhile, jurisdiction will be retained and the case will remain on the docket of this Court in the event the plaintiff hereafter requests judicial enforcement of its demand as to removal of the fill within 120 days.

The action of the Corps in declining a permit does not affect the power of this Court to determine the matter of jurisdiction and to grant a permanent injunction as to further construction or filling by the defendant.

It is therefore ordered, adjudged and decreed that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns and each of them be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations on the

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[6] See also *Di Vosta Rentals Inc. v. Lee*, 488 F.2d 674, 680 (5th Cir.) where the proper standard of review of administrative action was held to be whether or not the Secretary's decision is arbitrary or capricious.

area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

Counsel for plaintiff may present a form of judgment and decree in conformity with this Order. Since a permanent injunction has been granted a direct appeal will in all likelihood lie if notice thereof is filed within 30 days of the filing of such judgment and decree.

This April 17th, 1974.

/s/ ALEXANDER A. LAWRENCE

CHIEF JUDGE,
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA
v.
HERMAN DIAMOND
} CIVIL NO. 3092

JUDGMENT

This cause came on to be heard on the complaint of the United States of America, plaintiff, and the Court having heard oral evidence and admitted exhibits in open court and the Court having entered its findings of fact and conclusions of law on April 17, 1974, and it further appearing to the court that the defendant is committing acts and is about to commit acts as set forth in plantiff's complaint, and will continue to do so unless restrained by order of this court, and that the said acts have caused irreparable injury and damage to the marshlands described in the complaint and that immediate and irreparable injury, loss or damage to the described area will result and that the activities described in the complaint have been conducted by Herman Diamond without a permit from the Secretary of Army as required by 33 U.S.C. Section 403 and are in direct violation of the laws of the United States.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns, and each of them, be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction

operations on the area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

This 17th day of April, 1974.

/s/ ALEXANDER A. LAWRENCE

CHIEF JUDGE,
UNITED STATES DISTRICT COURT